91-727

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No. 91-

UNITED STATES SUPREME COURT

October Term 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,	)
Petitioner,	)
v.	)
EDWARD C. NICHOLS,	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTION PRESENTED

Does the doctrine of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) preempt application of South Carolina's wage payment law to a hiring refusal claim where the refusal is also arguably an unfair labor practice under the National Labor Relations Act?

PARTIES

The parties to this proceeding are the petititioner (defendant below), Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, an unincorporated association, and respondent (plaintiff below) Edward C. Nichols, an individual.

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Petitioner, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC ("ACTWU") prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of South Carolina entered on August 5, 1991.

OPINIONS BELOW

The decision of the Supreme Court of South Carolina is not yet reported and appears in the appendix at pp. A-1 — A-15.

The opinion of the South Carolina Court of Appeals is unreported and appears in the appendix at pp. A-16 — A-20. The opinion of the Circuit Court for York County is unreported and appears in the appendix at pp. A-21 — A-23.

JURISDICTION

The decision of the Supreme Court of South Carolina was filed on August 5, 1991. This petition is being filed within 90 days of that date. The South Carolina Supreme Court's decision is a final judgment rendered by the highest court of that state in which a decision could be had, and it draws into question the validity of the South Carolina Wage Payment Act, S.C. Code Ann. §§ 41-10-10, et seq., on the ground of its being repugnant to the Constitution and laws of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTES AND RULES

U.S. Constitution, Art. VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

National Labor Relations Act
29 U.S.C. § 157

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

National Labor Relations Act
29 U.S.C. § 158(a)(1)

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title. . . .

S.C. Code Ann.
§ 41-10-10. Definitions.

As used in this chapter:

(1) "Employer" means every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State.

S.C. Code Ann.
§ 41-10-80. Violations and penalties; civil actions by employees; administrative review of civil penalties.

(C) In case of any failure to pay wages due to an employee as required by § 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow.

STATEMENT OF THE CASE

1. ACTWU is an international labor organization headquartered in New York City and comprised of local unions throughout the United States and Canada.

Some of ACTWU's locals operate independently, while others are constituted into joint boards comprising several locals within a geographic region. These subsidiary joint boards are separate "labor organizations" distinct from ACTWU under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(i). The Catawba Valley Joint Board (the "Joint Board") headquartered in Rock Hill, South Carolina included several ACTWU locals in that immediate area.

ACTWU operates under a written constitution adopted by its membership. The Joint Board operated under its own bylaws and the ACTWU constitution and was headed by a manager elected by delegates from its constituent locals. Under the ACTWU constitution, a joint board's manager is an officer and agent of the subsidiary, not the parent:

> All officers, representatives and organizers of local union or joint board shall be agents only of such local union or joint board and shall not be agents of ACTWU. ACTWU Const., Art. VIII, § 9. [Rec. 123][1]

Likewise, the Joint Board's bylaws denominate the manager as an official of the subsidiary, not the parent:

> The Joint Board shall elect a [manager] who shall also be, serve and act as Financial Secretary-Treasurer. The [manager] shall be an officer of the Joint Board but need not be a Joint Board Delegate to be eligible to hold office. Bylaws of Catawba Valley Joint Board, Art. V, § 1. [Rec. 129]

ACTWU's established practice throughout the United States is that some joint board managers are hired by ACTWU onto its own payroll as employees and are then paid by ACTWU, while others remain

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[1]Citations to material in the Transcript of Record (i.e., appellate record) in the court below is referred to here as "Rec." followed by the page number.

on the payroll of the joint boards where they are elected and are not employed by ACTWU itself. [Rec. 147-148]

2. On August 2, 1986 Respondent Edward C. Nichols ("Nichols") was elected manager of the Joint Board in a hotly contested election against Robert Ross, the incumbent who was preferred by ACTWU's leadership. ACTWU fully recognized Nichols as the duly elected Joint Board manager, but it refused to hire him as an employee on the parent union's payroll. It is undisputed that when Nichols assumed office, he deliberately failed to take a salary from the Joint Board and turned down an offer of wages from the Joint Board's president. [Rec. 52, 59-60] Instead, Nichols sought by a number of means to "set a precedent" [Rec. 61] that anyone who is elected as a joint board manager can deliberately

refuse a salary from his or her joint board and force ACTWU, the parent union, to hire the individual and pay the manager's salary.

3. Nichols first claimed wages from ACTWU by means of an internal union appeal which he ultimately failed to pursue to conclusion. [Rec. 143-46] Nichols thereupon filed an unfair labor practice charge with the National Labor Relations Board ("Board") alleging that ACTWU was his employer and that it had violated the National Labor Relations Act ("Act") by depriving him of wages "as a result of him having engaged in a protected concerted activity." [Rec. 149] The Board advised ACTWU about the precise nature of Nichols' retaliatory refusal to hire claim:

> As I indicated to you, the Charging Party is alleging that [ACTWU], as his Employer, has

> violated the Act by refusing to pay his wages and other benefits as a result of his having engaged in protected, concerted activity. Specifically, he is alleging that as a result of his having won the election for the position of Manager of the Catawba Valley Joint Board, the International has retaliated against him by refusing to make the payment of his wages and benefits. The animus against Nichols is allegedly based upon his having defeated the choice for the position of manager of the International Union. [Rec. 154]

Nichols withdrew his Board charge "because it wasn't getting anywhere" [Rec. 55] and because his lawyer "had advised me not to get no [sic] hopes up about any of these agencies doing anything for us." Ibid.

4. On February 26, 1987, after filing his charge with the Board, Nichols filed this lawsuit in the Circuit Court of York County for wages under the South Carolina Wage Payment Act, S.C. Code Ann.

§ 41-10-10, et seq. (Supp. 1989) The complaint alleged that ACTWU owed wages to plaintiff as an ACTWU employee "by virtue of [his] having been elected manager" of the Joint Board. [Rec. 3] ACTWU answered the complaint by admitting that Nichols was duly elected as Joint Board manager, but denying any obligation to pay him wages because of his election to a position in a subsidiary organization. [Rec. 4-8][2] The answer raised a number of affirmative defenses, including preemption under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Ibid.

After discovery, ACTWU moved for summary judgment on the ground (among

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[2]ACTWU removed the case to United States District Court for the District of South Carolina on March 27, 1987. The case was remanded to the Circuit Court of York County on May 23, 1988.

others) that Nichols' claims were preempted under Garmon. ACTWU pointed out that Nichols had admitted at his deposition that he had made the "same complaint" [Rec. 54] to the Board that he was making in this lawsuit. On June 9, 1989 the Circuit Court, relying explicitly on Garmon, held that "it is at least 'arguable' that this suit arises under § 7 or § 8 of the [Act]" and granted summary judgment to ACTWU. (A-23)

The South Carolina Court of Appeals affirmed the decision of the Circuit Court on September 24, 1990. It found that Nichols' claim was essentially one of retaliatory refusal to hire or pay and that it "is arguably the kind of unfair labor practice subject to the exclusive jurisdiction of the [Board]." (A-19) The Court of Appeals also found that if Nichols were a Joint Board employee, then

ACTWU would not owe him any wages, and if Nichols were an ACTWU employee, "it is at least arguable that he is not a managerial employee" outside the Board's coverage. (A-20) Nichols' petition for rehearing was denied and he thereafter sought certiorari from the South Carolina Supreme Court.

The South Carolina Supreme Court granted certiorari and, after briefing and oral argument, reversed the decision of the Court of Appeals. The court below held that Nichols' claim that he is an employee of ACTWU posed an issue which is not preempted by the Act "because this matter is a mere peripheral concern of the [Act] and touches interests deeply rooted in local feeling and responsibility." (A-12) The court below also held that the issue of Nichols' employment status "is vital to all causes of

action under S.C. Code § 41-10-10, et seq. and that Congress did not intend to preempt the application of this state law." Ibid. The court said that South Carolina's "interest in compelling employers to pay wages to their employees outweighs any interference with the [Act] or risk of sanctions being imposed upon conduct being protected by the Act which could result from the State being allowed to adjudge whether or not a claimant under § 41-10-10, et seq. is an employee of the party for [sic] whom wages are claimed." (A-13) Viewing Nichols' employment status as distinct from ACTWU's alleged retaliatory motive, the court remanded the case to the Circuit Court for trial on the issue of Nichols' employment status without regard to his claim of retaliatory motivation. (A-14, 15)

REASONS FOR GRANTING REVIEW

South Carolina's departure from the Court's labor preemption cases is so clear, so profound and so unsettling that the need for review and correction is compelling. We first demonstrate the clarity of the conflict between the decision below and Garmon. Next, we show how profound that conflict is by demonstrating that the decision below cannot be squared with this Court's more refined post-Garmon decisions. Finally, we demonstrate the broader importance of granting review in order to keep this area of our national labor policy stable.

A. The conflict is a clear one.

1. The conflict between the decision below and Garmon is plain and irreconcilable. This Court held in Garmon that "when it is clear or may fairly be assumed that the activities

which a State purports to regulate are protected by § 7 of the [Act], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that State jurisdiction must yield." 359 U.S. at 244. Although the court below recognized (i) that Nichols' claim for wages was founded upon "the threshold issue of whether he is in fact an employee of ACTWU" (A-5), (ii) that plaintiff "filed a charge with the NLRB claiming that ACTWU was in violation of the [Act] by virtue of its retaliatory refusal to hire him" (A-3) and (iii) that discrimination in hiring "is specifically defined as an unfair labor practice" (A-7) under the Act, it nonetheless refused to defer to the Board's primary jurisdiction as required by Garmon. The South Carolina court's departure from this Court's preemption rule could not be more

apparent or unequivocal. Garmon holds that the Board has primary jurisdiction over conduct which is arguably protected (such as plaintiff's running for office) or prohibited (such as ACTWU's refusal to hire). The South Carolina court, contrary to Garmon, held that when such cases arise under the state's wage payment law, one's employment status should always be determined by state court juries.

2. That the issue of plaintiff's employment status arises in the guise of a wage payment claim is of no special significance. This Court squarely held in Garmon that it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations." 359 U.S. at 244. Nor does it matter that

South Carolina is not seeking to enjoin the alleged refusal to hire. State interference with the Act's unfair labor practice jurisdiction by a suit for damages under a wage payment law is no less a restraint than a more direct assault upon federal law. The Supremacy Clause forbids all manner of interposition. This Court recognized as much in Garmon:

> Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.
>
> 359 U.S. at 247

3. The South Carolina court's expression that the employment status issue is not preempted "because this matter is a mere peripheral concern of the [Act] and touches interests deeply rooted in local feeling and responsibility" is an unsubstantiated and rote incantation of language in Garmon intended to demarcate generally the allocation of power in our democracy between federal and state authorities. The court below offers no basis for its conclusion that an individual's status as an "employee" is a "merely peripheral concern" of the Act. Nor does the court identify any "deeply rooted" local interest sufficient to avoid preemption.

Indeed, just the opposite of the South Carolina court's ipse dixit about matters of "peripheral concern" and "local interest" is true. On the issue

of refusals to hire, the federal interest is supreme and comprehensive, as Congress has vested primary jurisdiction in the Board to define the scope of unfair labor practices by employers (even when those employers happen to be labor unions). Application of state law to conduct which is arguably an unfair labor practice is precisely what this Court in Garmon said Congress sought to interdict:

> We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.
>
> 359 U.S. at 243

Likewise, reliance by the court below on the "local feeling and responsibility" exception to Garmon preemption is insubstantial. The court identified only a single local interest — that of "compelling employers to pay wages to their employees." (A-13) We readily agree that South Carolina has a legitimate interest in making sure that all employers pay their own employees what they are due as wages. It is Congress, however, not South Carolina, which is properly interested in whether an employer has committed an unfair labor practice by refusing to hire the individual as an "employee" in the first place. In this case the issue has always been whether ACTWU's refusal to hire Nichols was lawful.

This "threshold issue" (A-5) is one which is uniquely federal in character,

as this Court has recognized through five decades, NLRB v. Hearst Publications, 322 U.S. 111 (1944) (Definition of "employee"); NLRB v. Nat. Gas Utility Dist. of Hawkins County, 402 U.S. 600 (1971) (Definition of "employer"):

> Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems. Consequently, so far as the meaning of "employee" in this statute is concerned, "the federal law must prevail no matter what name is given to the interest or right by state law."
>
> NLRB v. Hearst Publications, supra, 322 U.S. at 123-24 (citations omitted).

South Carolina's interest in wage payment, therefore, is not directly implicated in ACTWU's refusal to hire Nichols. As we have pointed out, the federal interest is supreme in overseeing an employer's hiring practices, while state law is concerned with overseeing the payment of wages to individuals once they are hired. The "local interest" exception invoked by the court below, therefore, does not justify its interference with "federal legislation, administered by a national agency, intended to solve a national problem on a national scale." NLRB v. Hearst Publications, supra, 322 U.S. at 123.

4. The conflict between the decision below and Garmon stands out even more clearly when one considers the disparity between the federal and state remedies applicable to the same employer

conduct. Congress intended that victims of hiring refusals would file charges with the Board and ultimately obtain reinstatement and back pay under the Act. 29 U.S.C. § 160(c). In this case Nichols filed just such a charge, but dropped it before an initial determination by the Board's regional office. The decision below, however, would permit Nichols also to seek treble damages and counsel fees in state court under S.C. Code Ann. § 40-10-80(C) for the same unfair labor practice.

This Court faced an analogous situation in Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986), when it applied the Garmon preemption principle to a similar overlap in remedies. The Court, relying on Garmon, held that permitting a state remedy involving debarment of labor law violators would

"accentuate" the conflict with federal law because the scope of remedies for unfair labor practices is part of a comprehensive system of regulation established by Congress. 475 U.S. at 287.

So it is in this case. If the decision below is permitted to stand, individuals in South Carolina alleging refusals to hire involving arguable unfair labor practices could sidestep the Board's primary jurisdiction. The state courts, seemingly unbound by Garmon, would have free rein to impose treble damage liability on conduct which Congress sought to regulate exclusively through the Board's tailored remedial powers. The incursion here on federal law is thus immediate, and its effect on the delicate harmonic between state and national law is disturbing and merits

this Court's attention.

5. Finally, the South Carolina court's characterization of the employment status issue as distinct from a retaliatory refusal to hire does not avoid the impact of Garmon. Despite the instructions on remand that the Circuit Court may not consider evidence of any retaliation on ACTWU's part, the jury nonetheless must determine whether ACTWU will have to pay Nichols as an "employee" despite its undisputed refusal to hire him. We have shown that the determination of "employee" status in cases involving arguable unfair labor practices is a uniquely federal issue over which the Board has primary jurisdiction. NLRB v. Hearst Publications, supra.

Eliminating from the jury's purview evidence of ACTWU's motive does not thereby remove the hiring issue from the

range of arguable unfair labor practices. No such sleight of hand can obscure the central fact that Nichols cannot win in state court without proving to a jury that ACTWU's refusal to hire him was wrongful. Such a claim is, as Nichols himself admitted, the same one he made in his Board charge. [Rec. 54] Properly understood therefore, this case involves an unavoidable conflict with Garmon which should be reviewed and corrected.

The decision below, therefore, conflicts with Garmon in a way which defies harmonization or explanation on any recognized ground. Granting review is, therefore, necessary to vindicate the supremacy of federal law and maintain the integrity and vitality of the Garmon principle.

B. The conflict is a profound one.

The holding of the court below that "employee" status is henceforth to be determined by state court juries cannot be squared with a number of this Court's post-Garmon cases refining the primary jurisdiction doctrine. Three examples will suffice to demonstrate how profound the conflict is between the decision below and settled preemption principles.

1. In Amalg. Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), an employee's state contract claim for damages against his union was held preempted despite the employee's argument that his complaint charged only a simple violation of state law and not an unfair labor practice. This Court cut through the employee's "form over substance" argument:

> Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable. Preemption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.
>
> 403 U.S. at 292

In this case the South Carolina court failed to recognize that the issue of whether plaintiff was an employee of ACTWU was part and parcel of an unfair labor practice under the Act, just as was Lockridge's contract claim. Indeed, the South Carolina court's focus on the "purely internal union" exception noted in Lockridge (A-11) betrays its fundamental misunderstanding about ACTWU's role here as an employer, not a union.

2. Similarly, the decision below

conflicts with the rationale of Belknap v. Hale, Inc., 463 U.S. 491 (1983), where employees who claimed they were hired as permanent replacements during a strike sued the employer in state court for breach of contract and misrepresentation after being laid off to make room for strikers who returned to work as part of a settlement of unfair labor practice charges. This Court held that the replacements' state law claims were not preempted by Garmon because the controversy presented to the state court could not be fairly regarded as identical with the issue presented to the Board about the propriety of offering permanent employment to the replacements. 463 U.S. at 510-12.

The South Carolina court disregarded this "critical inquiry" into the identity of Nichols' Board charge and his state

court complaint even in the face of Nichols' admission that the Board charge was identical to the complaint he filed in this lawsuit. [Rec. 54] Belknap, Inc. v. Hale, supra, 463 U.S. at 510; see also Sears, Roebuck and Co. v. Carpenters, 436 U.S. 180, 197 (1978) (The "critical inquiry" is whether the controversy presented to the state court is identical to or different from that which could have been presented to the Board.) In contrast to Belknap and Sears, therefore, the fact that Nichols' Board charge is an admitted legal facsimile of his complaint in this action virtually guarantees the likelihood of "interference with the Board's function" which this Court has consistently protected against by means of the Garmon preemption rule.

3. Likewise, the decision below conflicts with this Court's holding in

Int. Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), where a ship superintendent who was discharged by his employer after participating in union-related activities sued the union in state court for fraud and misrepresentation based on the union's assurances about obtaining reinstatement if he were fired for such activities. After the superintendent won a verdict, the union raised preemption as a defense for the first time, but failed to demonstrate that the Board could regard the superintendent as an "employee" under the Act. This Court held that the superintendent's common law claims were thus not preempted because of the union's failure to "carry the burden of showing at least an arguable case" as to his status as an employee. 476 U.S. at 396.

The present case involves no such evidentiary insufficiency. The court below simply refused to apply Garmon in the face of substantial evidence based on the ACTWU constitution, the Joint Board bylaws and ACTWU's past practices demonstrating (supra, pp. 4-6) that Nichols is at least arguably a statutory employee of the Joint Board and that ACTWU's refusal to hire him was consequently an arguable unfair labor practice. Sending this issue of employment status to a state court jury without first making a determination about its character as a colorable or arguable federal issue not only contra- venes what this Court said in Davis, but it also portends substantial unnecessary litigation over the threshold question of employment status in what was hitherto an area of relative calm in the labor

preemption field.

So profound is the departure from established preemption principles that the decision of the South Carolina Supreme Court is at odds even with the post-Garmon decisions of this Court marking the outer boundary of the Board's primary jurisdiction. Review by this Court is, therefore, essential to make sure that the state courts do not intrude on the national labor policy which Congress has crafted and which this Court has sought to protect in such thorough detail.

C. The conflict is a significant one.

The issue presented is one of special importance in the administration of our national labor policy. Determining an individual's employment status in the context of an arguable unfair labor practice is central to our national plan

for regulating employer-employee relations. Employers and workers alike need to know with clarity and predictability who is and who is not subject to the Board's unfair labor practice jurisdiction. South Carolina's decision to determine for itself which employers will be exposed to liability for conduct that is arguably an unfair labor practice and which individuals are deemed "employees" of such employers is a decision which has the highest capacity for mischief in an area of our economic life which begs for stability and uniformity.

Congress has recognized the importance of constancy in the administration of our national labor policy. The preamble to the Act premises the thoughtfully drawn legislative plan in part on the "stabilization of . . . working conditions" and the protection of

employee rights as a means for removing one of the "sources of industrial strife and unrest." 29 U.S.C. § 151. Mindful of this legislative policy, this Court held in Hearst Publications, that the definition of "employee" status must be regarded as a federal issue if "patchwork" regulation is to be avoided. 322 U.S. at 123. Similarly, in Garmon this Court stressed that responsibility for defining the reach of the Board's unfair labor practice jurisdiction is vested exclusively in the Board itself. 359 U.S. at 242-43.

Ignoring these fundamental precepts of national labor policy made binding on the states by the Supremacy Clause, the court below held that because employment status is "vital to all causes of action under" South Carolina's wage payment laws, henceforth an individual's

employment status would be determined by local judges and juries. Aside from the South Carolina court's jurisprudential misstep, its decision will spawn the kind of uncertainty and instability about unfair labor practices which Congress and this Court have sought to minimize.

The South Carolina decision, which effectively permits state juries to determine the reach of federal law, would thus destabilize what bench, bar and the public have plausibly assumed was an established element of labor relations jurisprudence. It has long been clear that the states could effectively establish minimum employment standards through wage payment laws or otherwise. E.g., Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). But until the decision below, neither South Carolina nor any state could define the reach of

the Act's unfair labor practice jurisdiction by permitting local juries to decide the employment status of an individual whose wage payment claim is also an arguable unfair labor practice.

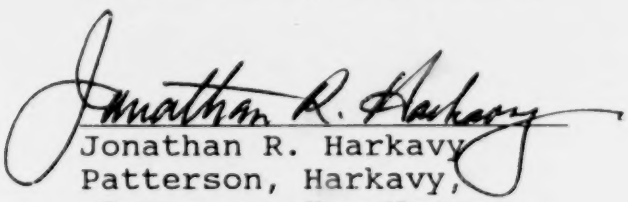
The truly disturbing importance of this case is that it is the proverbial "tip of the iceberg." Virtually all states have wage payment laws similar to South Carolina's. See generally, [4 and 4A, State Laws] Lab. Rel. Rep. (BNA) §§ 10-61 inclusive at subsections 6.25 and 6.75 (1991). If other state courts follow South Carolina's lead, employers — particularly multi-state ones — will face the kind of piecemeal regulation unintended by Congress and this Court alike. No matter how small or idiosyncratic this case may appear, therefore, its importance to the jurisprudence cannot be overstated. Review of the issue presented by this

case is thus necessary in order to reestablish the uniformity of regulation necessary to secure industrial peace.

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the decision of the South Carolina Supreme Court.

Respectfully submitted,



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October 25, 1991

RECITATION UNDER RULE 29.4

28 U.S.C. §2403(b) may be applicable to this case, and counsel has therefore served the Attorney General of South Carolina pursuant to Supreme Court Rule 29.4(c).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Edward C. Nichols, Petitioner

v.

Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Respondents

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Appeal from York County
Robert L. McFadden, Judge

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Opinion No. 23446
Heard June 14, 1991 - Filed Aug. 5, 1991

REVERSED AND REMANDED

Louis L. Lesesne, Jr. of North Carolina for Petitioner

Jonathan Harkavy of North Carolina and E. N. Zeigler, of Florence, for Respondents.

Toal, A.J.: This case comes before the Court on a writ of certiorari to the Court of Appeals. The action was brought under S.C. Code § 41-10-10 et seq. by an

elected manager of a local labor union who seeks to compel the payment of his salary by the parent national labor union. The Circuit Court held and the Court of Appeals affirmed that this action is preempted by the NLRA. We reverse and remand for trial.

STATEMENT OF FACTS

The ACTWU is a national labor organization. The Catawba Valley Joint Board is a subsidiary labor organization comprised of three local unions which are affiliated with ACTWU. On August 6, 1986, the plaintiff, Nichols, was elected as the manager of the local joint board. His opponent in the election was the admittedly preferred candidate of the ACTWU. The ACTWU has refused to hire or recognize Nichols as an employee or to pay him any compensation.

Nichols filed a charge with the NLRB claiming that ACTWU was in violation of the NLRA by virtue of its retaliatory refusal to hire him. The charge alleged that the ACTWU was retaliating against him for having run in opposition to their preferred candidate. Nichols ceased his pursuit of this charge on the advice of his attorney that he would not be able to gain relief through the NLRB. As an alternate means of recovery, Nichols instituted this action for wages under South Carolina Code § 41-10-10, et seq., claiming that he should be considered an employee of ACTWU by virtue of ACTWU's constitution and its past practice of treating local union managers as employees, and that he was thereby entitled to wages.

Nichols filed his complaint in this action on February 27, 1987. ACTWU had

the case removed to federal court. The federal court ruled that the case did not fall within the bounds of § 185(a) because Nichols' claim "hinges exclusively on an interpretation of the ACTWU constitution" and because the United States Supreme Court has expressly reserved ruling and thereby avoided holding that § 301 covers suits by union members on the union constitution against the union organization. See, United Ass'n of Journeymen v. Local 334, 452 U.S. 614, 627, 101 S.Ct. 2546, 2553, n. 16. The Federal Court remanded the case back to the circuit court on May 23, 1988.

On remand to state court, ACTWU moved for summary judgment on the grounds that Nichols' claims were preempted and legally insufficient. The circuit court held that the suit was preempted by the

NLRA, and granted summary judgment to ACTWU. Nichols appealed the circuit court decision to the Court of Appeals, which affirmed on the ground that, "Nichols' claim of retaliatory refusal to hire or pay, if proven, is arguably the kind of unfair labor practice subject to the exclusive jurisdiction of the National Labor Relations Board." Nichols seeks review by this court on a writ of certiorari.

LAW/ANALYSIS

In the case at bar, for Nichols to succeed in his cause of action for payment of wages, he must overcome the threshold issue of whether he is in fact an employee of ACTWU so as to be entitled to wages. This Court has previously decided in Kimbrell v. Jolog Sportswear, Inc., 239 S.C. 415, 123 S.E.2d 524 (1962); that an action for wages under

this state's statutory law is not preempted by the NLRA. The question that remains for our consideration here is whether the NLRA preempts the state court's consideration of whether Nichols is an employee of ACTWU by virtue of its past practices and its constitution.

Sections 7 and 8 of the NLRA explain the employee activities which are protected by the act and the employer conduct which is prohibited by the act. Section 7 provides,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 158(a)(3) of this title.

Section 8 defines the activities of employers and labor organizations which are considered to be unfair labor practices. The failure to pay wages is not listed among these activities. However, discrimination in regard to hiring is specifically defined as an unfair labor practice prohibited under the NLRA.

The United States Supreme Court has had occasion in several cases to develop an analysis for determining whether a state cause of action is preempted by the NLRA. In the watershed case of San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), the Supreme Court established the doctrine that "state regulations and causes of action are presumptively

preempted if they concern conduct that is actually or arguably either prohibited or protected by the act." Belknap, Inc. v. Hale, 463 U.S. 491, 498, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798, 807 (1983) (citing Garmon).

However, the Garmon, doctrine also provided that the state regulation or cause of action may be sustained if the behavior to be regulated is behavior that is of "merely peripheral concern" to the federal law or "touches interests so deeply rooted in local feeling and responsibility" that the courts should not assume that Congress intended to preempt the application of state law. Garmon at 245, 79 S.Ct. at 779; Belknap at 498, 103 S.Ct. at 3177. "In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference

with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects." Belknap at 498, 103 S.Ct. at 3177.

Belknap involved a contract dispute between an employer and the replacement employees which were hired to replace striking workers. The replacement employees claimed that the employer breached his contract with them by dismissing the replacement workers and reinstating the striking workers upon resolution of the dispute between the employer and the striking workers.

In Belknap, the Supreme Court considered both preemption doctrines[1] and

[1]A second preemption doctrine was set out in Machinists v. Wisconsin Employment Relations Comm'n., 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), which

concluded that, "the interests of the Board and the NLRA, on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other, are "discrete" concerns." Belknap at 512, 1023 S.Ct. at 3184. The Belknap opinion further stated, "we see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy or the federal labor laws." Ibid.

"proscribed state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated," including "conduct that has to remain a part of the self-help remedies left to the combatants in labor disputes." Belknap at 499, 103 S.Ct. at 3177. We do not address this second preemption doctrine here as it has no applicability to the facts at bar. There is no contention, nor any support for such a contention, that the federal law intended to leave unregulated the conduct of employers failing to compensate their employees.

In the United States Supreme Court case of Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), the Supreme Court explained that the NLRA does not preempt lawsuits "focused on purely internal union matters." Id. at 296, 91 S.Ct. at 1922. The Court referred to the case of International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958); and explained that the NLRA did not preempt the state cause of action there because, "To assess the legality of his union's conduct toward Gonzales the California courts needed only to focus upon the union's constitution and by-laws." Lockridge at 296, 91 S.Ct. at 1923. Similarly, we find that in the case at bar, the circuit court need only to focus upon ACTWU's constitution, by-laws, and prior

practices. In fact, we specifically instruct that the circuit court should not consider any alleged retaliatory motivation on the part of the union nor any other conduct of the union outside of a breach of contract analysis as was allowed in Belknap and Gonzales.

We hold that Nichols' claim that he is an employee is a discrete concern from any claim that the union refused to hire him on a retaliatory ground. Nichols should be allowed to pursue his action under S.C. Code § 41-10-10 for payment of wages and any issue as to his status as an employee is not preempted by the NLRA because this matter is a mere peripheral concern of the NLRA and touches interests deeply rooted in local feeling and responsibility. We hold that the issue of employment status is vital to all causes of action under S.C. Code § 41-10-

10 et seq. and that Congress did not intend to preempt the application of this state law.

We hold that the State's interest in compelling employers to pay wages to their employees outweighs any interference with the NLRA or risk of sanctions being imposed upon conduct protected by the Act which could result from the State being allowed to adjudge whether or not a claimant under § 41-10-10 et seq. is an employee of the party for [sic] whom wages are claimed.

ACTWU offers several other grounds to support their motion for summary judgment. However, those grounds were not offered or considered at the hearing on the motion, in the order granting the motion, or even in the motion itself. They were introduced for the first time as additional sustaining grounds

submitted pursuant to Nichols' intent to appeal. Since an additional sustaining ground must be argued below to be available for consideration on appeal, these grounds need not be considered and the summary judgment may be reversed on the sole ground of NLRB preemption.

Nichols' complaint filed in state court does not assert a claim of retaliation, but merely relies on an interpretation of ACTWU's constitution and past practices. In fact, the essence of his complaint is a claim for wage payment and any determination of his status as an employee is an issue which is deeply rooted in local interest and not preempted by the NLRA. Therefore, we hold that the state court has jurisdiction over this claim and a trial is proper on the issue of failure to pay wages without consideration of any

allegations of a retaliatory refusal to hire. For these reasons, we **REVERSE** and **REMAND** for a trial in accordance with these instructions.

GREGORY, C.J., HARWELL, CHANDLER and FINNEY, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward C. Nichols, ... Appellant

v.

Amalgamated Clothing and
Textile Workers Union,
AFL-CIO, CLC, ... Respondent

Appeal from York County
Robert L. McFadden, Judge

Memorandum Opinion No. 90-MO-129
Heard Sep. 11, 1990 - Filed Sep. 24, 1990

AFFIRMED

Louis L. Lesesne Jr., of Gillespie, Lesesne & Connette, of Charlotte, N.C., for Appellant.

E. N. Zeigler, of Florence; and Jonathan Harkavy, of Smith, Patterson, Follin, Curtis, James & Harkavy, of Greensboro, N.C. for Respondent.

MEMORANDUM OPINION

PER CURIAM: The plaintiff, Nichols, sued the defendant, Union, for failure to

pay wages. The trial court granted summary judgment to Union, finding the claim was within the exclusive jurisdiction of the National Labor Relations Board. Nichols appeals; we affirm.

Nichols was elected as Board Manager of the local Joint Board. He contends the Union must pay his wages because he is an employee of the Union, arguing the Union employs and pays other similarly situated board managers. He contends further that the Union refuses to pay him because he defeated the Union's hand-picked candidate in the election of the Joint Board Manager. Thus, his claim is one of a retaliatory refusal to hire or pay.

The National Labor Relations Board has exclusive jurisdiction over the actions which "arguably" involve a violation of Sections 76 or 8 of the

Labor Management Relations Act, codified at 29 U.S.C. Sec's. 157 and 158, respectively. Breininger v. Sheet Metal Worker's International, U.S. , 110 S.Ct. 424 (1989). This "arguably involves" test for jurisdiction clearly seeks to promote and protect the uniformity of decisions in this federally preempted area of law.

Our research reveals no case on point, and neither party has cited a clearly controlling case. Although distinguishable on their facts, we find guidance in the following cases: Buscemi v. McDonnell Douglas Corp, 736 F.2d 1348 (9th Cir. 1984) (NLRB's exclusive jurisdiction includes retaliatory discharges for engaging in protected activities), cert. denied 465 U.S. 1029; Capitol City Lumber Co. v. N.L.R.B., 721 F.2d 546 (6th Cir. 1983) (NLRB has

jurisdiction to resolve contractual disputes when essential to the resolution of an unfair labor practice complaint); Mellot v. General Teamsters and Allied Workers, 534 F.Supp. 712 (D.Md. 1982) (NLRB has exclusive jurisdiction over actions involving the discharge of union employees for participation in the campaign of an opponent because such claims are arguably unfair labor practices); and Bebensee v. Ross Pierce Elec. Corp., 400 Mich. 233, 253 N.W.2d 63 (1977) (a state's interest in protecting workers from discriminatory treatment is adequately protected by federal law).

Nichols' claim of retaliatory refusal to hire or pay, if proven, is arguably the kind of unfair labor practice subject to the exclusive jurisdiction of the National Labor Relations Board. We express no opinion

on the merits of his claim.

Nichols also argues the general principle that management employees are not subject to the jurisdiction of the NLRB. We agree with this general principle but find it unavailing in this case. If Nichols is an employee of the Joint Board rather than the Union, then clearly he is a managerial employee not subject to the NLRB's jurisdiction. But if he is an employee of the Joint Board, then the Union does not owe him any wages. If, as Nichols contends, he is an employee of the Union, then it is at least arguable that he is not a managerial employee and, therefore, is subject to the NLRB's jurisdiction.

Accordingly, we affirm the judgment below.

AFFIRMED.

s/_____
s/_____
s/_____

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C.A. NO. 88-CP-46-1264

Edward C. Nichols, Plaintiff, vs. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Defendant.	**ORDER**

This matter came before the Court on Motion of Defendant Amalgamated Clothing and Textile Workers Union ("ACTWU") for Summary Judgment. This action involves a dispute between Plaintiff Nichols and ACTWU as to Nichols' employment status under the South Carolina wage payment law. Defendant contends that this Court lacks jurisdiction for the present because of provisions of the National Labor Relations Act ("NLRA"). For the reasons set forth below, Defendant's

Motion for Summary Judgment is granted.

The Federal Government has chosen to regulate labor law. When an activity may be subject to §7 or §8 of the NLRA, both state and federal courts must defer to the National Labor Relations Board ("NLRB"). San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 at 245 (1959).

Nichols filed and later abandoned a charge with the NLRB before instituting this state action. This charge alleged that ACTWU is Nichols' employer, and that as such, it has violated the NLRA by depriving Nichols of his wages "as a result of him (sic) having engaged in a protected concerted activity." Exhibit G to ACTWU's Motion for Summary Judgment. At his deposition, Nichols testified that his NLRB charge makes the same complaint he asserts in this lawsuit. Nichols' deposition, p. 82. Therefore, it is at

least "arguable" that this suit arises under §7 or §8 of the NLRA. Under these circumstances neither this Court nor the federal courts appear to have jurisdiction over this matter.

Summary Judgment is granted to ACTWU, and this suit is dismissed without prejudice. In the event that Nichols presents this suit to the NLRB again, and that body determines it does not have jurisdiction, Nichols may refile in this Court.

AND IT IS SO ORDERED.

/s/ Robert L. McFadden
Judge, Sixteenth Judicial Circuit

Rock Hill, South Carolina
June 9, 1989

(2)

NO. 91-727

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,
Petitioner,

vs.

EDWARD C. NICHOLS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May an employer avoid an action by an employee to collect wages due under a state's wage payment law simply by contending that its reason for refusing to pay wages was one that is forbidden by § 7 of the National Labor Relations Act and that the claim is therefore preempted by NLRA?

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NO. 91-727

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, Petitioner,

vs.

EDWARD C. NICHOLS, Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

---

RESPONDENT'S BRIEF IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at 408 S.E.2d 237.

STATEMENT OF THE CASE

Respondent Edward C. Nichols was, in August 1986, elected manager of the Catawba Valley Joint Board, a subsidiary organization of the petitioner Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Respondent was elected by delegates to the Joint Board who represent various local unions of the respondent located in South Carolina and North Carolina. These local unions comprise the membership of the Joint Board.

Even though a joint board manager is elected by delegates to the Joint Board, petitioner has routinely placed Joint Board managers in its Southern Region on the payroll as employees of the petitioner and has paid their salaries. Following respondent's election, however, petitioner refused to compensate respondent for his services as Joint Board manager. Respondent's predecessor, on the other hand, was an employee of petitioner for his entire three-year term.

Some employees of petitioner are represented for collective bargaining purposes by a separate union, the Federation of Union Representatives (FOUR). However, Joint Board managers are recognized by petitioner and by FOUR to be managerial employees outside the bargaining unit represented by FOUR. The Joint Board position to which respondent was elected had no connection to FOUR or its collective bargaining relationship with petitioner or to any other aspect of collective bargaining. On the contrary, the position of Joint Board manager is excluded from the bargaining unit because the manager is recog-

nized to be a managerial employee. Record, pages 189-190.

The sole factual issue presented here is whether, under South Carolina law, respondent became an employee of the petitioner when he was elected to the position of Joint Board manager. Petitioner has at all times acknowledged that, should respondent be found to be its employee, it would be obligated to pay him wages under the South Carolina wage payment law, S.C. Code § 41-10-40. However, it has sought to avoid having a state court jury resolve the single factual issue of his employment, even though the issue presents a pure question of state law.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because there exists no conflict between the decision under review and decisions by this Court and because the case presents no important questions of federal law. On the contrary, this case presents a unique factual and legal situation which will not affect persons or entities other than the parties.

Petitioner makes no contention that there exists any conflict with any lower federal or state courts. In view of the number of states that have wage payment laws, the absence of any case conflicting with the decision here shows at the very least that the decision does not have the cosmic significance attributed to it by petitioner.

Contrary to petitioner's assertion, there exists no conflict between this case and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The South Carolina Supreme Court correctly applied *Garmon* to the unusual facts of this case. The state law said by petitioner to be preempted requires the payment of wages, an area of labor relations which is within the area traditionally left to state regulation, and the South Carolina Supreme Court appropriately relied on *Garmon* and subsequent decisions by this Court that such claims are not preempted, even if they are otherwise arguably within the jurisdiction of the National Labor Relations Board.

Moreover, *Garmon* applies only "[w]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 . . . or constitute an unfair labor practice under § 8." 359 U.S. at 244. Petitioner has failed even to meet its threshold requirement of showing that respondent's conduct was within the arguable jurisdiction of the Board. The petition for certiorari is completely silent as to both the legal and factual basis for contending that respondent's claim is within the arguable jurisdiction of the Board. In fact, there is no colorable NLRA claim, both because a Joint Board manager is exempted from the protection of the Act and because there are no activities which § 7 of the National Labor Relations Act, 29 U.S.C. § 157, protects or which are made illegal by § 8, 29 U.S.C. § 158. There is no conflict where the state claim is not within the arguable jurisdiction of NLRB.

I.
THE DECISION APPROPRIATELY RECOGNIZES THE IMPORTANT STATE INTERESTS INVOLVED IN A STATE'S WAGE PAYMENT ACT

The decision of the South Carolina Supreme Court does not conflict with *Garmon* or decisions construing *Garmon*. On the contrary, it is consistent, finding no preemption where a state statute regulates an area which is traditionally left to state regulation, either because the activity is of only peripheral concern of the Act or because it is so "deeply rooted in local feeling and responsibility." 359 U.S. at 244.

A. The State Law Claim is Not Preempted Because It Involves an Area Traditionally Left for Regulation by the States.

Beginning with *Garmon*, the Court has recognized that due regard for our federal system requires that certain categories of cases are not preempted by the Act, even though they otherwise fall within the arguable jurisdiction of the Board.[1] *Garmon* recognizes that considerations of federalism require that the states be allowed to regulate those areas which fall within spheres traditionally left to the states.

> However, due regard for the presuppositions of our embracing federal sys-

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[1]As pointed out in Part II of this Brief, this case does not even fall within this category of cases, because petitioner has failed to make any showing that respondent's claim is within the Board's jurisdiction.

> tem, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Id., 359 U.S. at 243-244 (footnote and citation omitted).

It would be difficult to conceive of an area of employer-employee relations more "deeply rooted in local feeling and responsibility" than that of ensuring that a state's citizens receive wage payment. Indeed, the South Carolina Supreme Court nearly 30 years ago characterized the payment of wages as an issue which "is a matter of legitimate State concern and of *compelling State interest*." *Kimbrell v. Jolog Sportswear Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962) (emphasis added).

The decision in this case reaffirms South Carolina's interest in protecting this important right as a matter of state law. Petitioner's dismissal of the South Carolina Supreme Court's description of the

importance of this prerogative as "an insubstantial and rote incantation of language in *Garmon*," see Petition for Certiorari, at page 18, ignores the South Carolina court's long standing recognition in *Kimbrell* of this obvious State interest.

This Court has continued to defer to such important state interests in finding no preemption.

> On the other hand, because Congress has refrained from providing specific directions with respect to the scope of preempted state regulation, the Court has been unwilling to "declare preempted all local regulation that touches or concerns in any way the complex interrelationship between employees, employers and unions."

Farmer v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 430 U.S. 290, 295-296 (1977), quoting *Amalgamated Ass'n. of Street, Electric, Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971).

In *Belknap Inc. v. Hale*, 463 U.S. 491, 509 (1983), the Court said:

> Under *Garmon*, a State may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law.

Accord, *International Longshoremen's Ass'n. v. Davis*, 476 U.S. 380, 392-393 (1986). Petitioner cites *Belknap Inc. v. Hale* and *Davis* as further examples of conflict with the South Carolina Supreme Court, even though the Court found no preemption in both cases. In *Lockridge*, the final case cited as being in conflict with the decision here, the Court found preemption arising out of internal union procedures. Petitioner makes it clear, however, that it is here as an employer, not as a union. Petition for Certiorari, page 28. There is thus no conflict.

These cases recognize that in the case of such state statutes, the usual rules of preemption do not apply, and that there must be some specific Congressional direction of intent to preempt such state law. Petitioner has failed to identify any such "compelling congressional direction." It follows that South Carolina's wage payment law is appropriately left for state regulation and that it is not preempted. Respondent's claim falls squarely within this precedent. A state's law requiring payment of wages is precisely the type of law subject to this doctrine; it is a minimum employment standard falling within the traditional prerogative of the states.

Petitioner's position, if accepted, would result in the creation of a completely new doctrine of preemption not found in any of this Court's decisions. It would effectively preclude state courts from enforcing their wage payment laws upon an employer's simply invoking § 7 and § 8. Such an extreme position is not supported by any of the Court's prior cases and is not supported by any showing of the requisite Con-

gressional statement of intent to do so.

B. The State Law Claim Requires Different Proof from the Putative Unfair Labor Practice Claim.

The foregoing discussion is reenforced by the fact that respondent's state law claim requires a wholly different factual and legal showing from the putative NLRA claim. The South Carolina Supreme Court recognized that the requisite elements of a claim under NLRA are not presented here, where respondent needs only to establish his employee status in order to recover under state law. *Adamson v. Marianne Fabrics Inc.*, 301 S.C. 204, 391 S.E.2d 249, 250-251 (1990). See also *Cook v. Georgetown Steel Corp.*, 770 F.2d 1272, 1275 (4th Cir. 1985). Petitioner's motive for its refusal to pay respondent's wages is wholly irrelevant. Indeed, the South Carolina Supreme Court explicitly directed the trial court not to consider factors that a claim under NLRA would present:

> In fact, we specifically instruct that the circuit court should not consider any alleged retaliatory motivation on the part of the union nor any other conduct of the union outside of a breach of contract analysis as was allowed in *Belknap* and *Gonzales*.

Petition for Certiorari, page A-12.

In order to sustain a claim under NLRA, re-

spondent would be required to show that petitioner was motivated by an intent to deprive him of rights protected by § 7, i.e., that petitioner had interfered with, restrained or coerced respondent in the exercise of rights guaranteed by § 7. While this inquiry is totally hypothetical, since petitioner has never, in the protracted history of this litigation, identified what activity was protected by § 7, it is clear that petitioner's action would be illegal under NLRA only if petitioner has interfered with or restrained such a right, in violation of § 8. That would be the critical inquiry in any proceeding before the Board.

In order to avoid this incontrovertible distinction, petitioner relies solely on respondent's having characterized in his deposition his claim under South Carolina law as being the "same claim" as was presented to the Board. Petition for Certiorari, pp. 29-30. While it may be true, from a lay point of view, that the two claims are the same, in the sense that they arise out of the same factual situation, they are dramatically different both in terms of what facts are required to prove each claim and what legal tests apply. It is not the "same case" under this Court's cases.

The South Carolina Supreme Court therefore decided this case consistently with *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1977), where the Court, in finding no preemption, said that the inquiry is whether the controversy presented to the state court is identical to or different from that which could have been presented to the Board. 436 U.S. at 197. It is only

the former situation, where the state court's exercise of jurisdiction necessarily involves a risk of interference with the Board's jurisdiction over unfair labor practices, that the "arguably protected branch of the *Garmon* jurisdiction was designed to avoid." 436 U.S. at 197.

In *Farmer v. United Brotherhood of Carpenters and Joiners*, the plaintiff brought an action against a union for intentional infliction of emotional distress in connection with the union's refusal to refer him for employment. Even though the union's refusal to refer could have been an unfair labor practice, depending on the union's motivation, the Court held that the claim was not preempted because the state court and the Board would be adjudicating different issues.

> If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of union officials discriminated against him in employment referrals for reasons other than failure to pay union dues . . . . Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the damages for pain, suffering or medical expenses. Conversely, the state court tort action can be adjudicated without resolution of the "merits" of the under-

> lying labor dispute. Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress . . . . The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context.

430 U.S. at 304-305. Accord, *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966) (action for libel). Similarly, in *Belknap Inc. v. Hale*, *supra*, the fact that the issue which would have to be resolved by the Board was different from that which the state court would have to resolve in adjudicating a breach of contract claim. 463 U.S. at 510.

The South Carolina Supreme Court correctly recognized that the factual issue presented in this action in no way depends on any determination of whether petitioner has interfered with the exercise of rights protected by NLRA. The only dispute is whether respondent was an employee of petitioner, a factual question which is completely divorced from the questions which the NLRB would have to resolve, and which is exclusively an issue of state law. See

Petition for Certiorari, pages A-14-15.

II.
PETITIONER HAS MADE NO SHOWING THAT RESPONDENT'S CLAIM IS ARGUABLY WITHIN THE JURISDICTION OF NLRB

Because *Garmon* applies only "when it is clear or may fairly be assumed that the activities which the state purports to regulate are protected by § 7 . . . or constitute an unfair labor practice under § 8," there can be no conflict with *Garmon* where the claim does not meet this test. Preemption is not presumed, and in order to be entitled to avail itself of the defense, petitioner has the affirmative obligation to make a specific legal and factual showing that respondent's claim falls within the Board's jurisdiction.

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that

> has not been "authoritatively rejected" by the courts or the board. *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 184 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

International Longshoremen's Ass'n. v. Davis, *supra*, 476 U.S. at 394-395. The petition is devoid of any such showing, and that void is itself grounds for denying the petition. The discussion that follows will demonstrate why petitioner has substituted conclusory assertions of "arguably protected" for the showing that *Davis* requires.

Petitioner has failed to suggest "an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the board." 476 U.S. at 395. The Petition invokes the rubric of "hiring discrimination," but it fails to show how such "hiring discrimination" is related to activities made illegal by § 8. It mentions in passing that the action protected by § 7 is "running for office," Petition for Certiorari, at page 16, even though it later protests that it is in this Court as employer, not as union. Petition for Certiorari, page 28.

Possibly even more significantly, petitioner fails even to mention, much less discuss, the fact that respondent's position as Joint Board manager has been conclusively determined to be a managerial

position, outside the protection of the Act.

Because this Court has so consistently found no preemption in cases involving areas traditionally regulated by state law, even though they are otherwise arguably within the jurisdiction of NLRB, the South Carolina Supreme Court found it unnecessary to determine whether respondent's claim was arguably within the Board's jurisdiction. Had it done so, however, petitioner would have failed to make the required showing on either of two grounds.

A. *The Joint Board Manager Position is a Managerial Position, Excluded from Coverage by the Act.*

There can be no preemption where the employee is in a position over which the Board has no jurisdiction. A state law claim by such a person is not preempted, even if his activities would otherwise have been protected by § 7. *Hanna Mining Co v. District 2, Marine Engineers Beneficial Ass'n.*, 382 U.S. 181, 188 (1965); *International Longshoremen's Ass'n. v. Davis, supra*, 476 U.S. at 394. There is no threat of "conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Amalgamated Ass'n. of Street, Electric Railway and Motor Coach Employees of American v. Lockridge, supra*, 403 U.S. at 285-286.

NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974) held that Congress intended to exclude managerial employees from NLRA coverage. Respondent's position as joint board manager is such a position.

An arbitration decision to which petitioner was a party and which relied on the construction of NLRA and not just on contract language, and which was submitted for arbitration in lieu of a determination by the NLRB as to whether joint board managers were within the bargaining unit, explicitly found that joint board managers are managerial employees. The arbitrator held:

> By virtue of the *Bell Aerospace* decision it is now enough to warrant exclusion [of Joint Board managers from a bargaining unit] that the employees in question are truly "managerial employees." They function as "middle management." They exercise a good deal of independent judgment in the day-to-day function of the organization at the Joint Board level. They have the power to commit its funds. They are in every sense "managers," not only in title but in function. They are in no way just "working leaders." Without them, there would be no one in the organizational structure to conduct the affairs of the International Union and of the Joint Boards at their levels.

Record, pages 189-190. Petitioner's failure to address this finding is presumably explained by its recognition that it presents a fatal blow to its theory of preemption. Because the record is uncontradicted that respondent was a managerial employee, it follows that his claim is not preempted.

B. There Is No Showing that Respondent's Actions Were Within the Range of Those Protected by § 7.

The rights protected by the Act are set forth in § 7, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) of NLRA, 29 U.S.C. § 158(a)(1) makes it an unfair labor practice for an employer

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Not every matter dealing with employer-employee relations falls within the Board's jurisdiction, and § 7 and § 8 do not regulate the internal affairs of labor unions where they are unrelated to the terms

and conditions of employment. Petitioner has failed to satisfy the *Davis* requirement that it "demonstrate that [respondent's] case is one that the Board could legally decide in his favor." *Id.*, at 395. The Petition is silent as how respondent's running for union office brought him within the arguable jurisdiction of NLRB.

The Act protects collective bargaining and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In order to show preemption, petitioner must show both (1) concerted activities which are (2) undertaken for the purpose of collective bargaining or other mutual aid and protection. *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984); *Meyers Industries Inc.*, 281 NLRB No. 118, 123 LRRM 1137, enfd, 835 F.2d 1481 (D.C.Cir. 1987), cert.den., 487 U.S. 1205 (1988). Petitioner fails to make even a suggestion that either test has been satisfied.

Petitioner has never identified in what respect respondent's running for union office was concerted activity as defined by the Act. It has not asserted that respondent acted with or on behalf of any other employees. Indeed, there has been no assertion that any other employees of the petitioner were connected with petitioner's actions. There is no showing that respondent's activities in running for office within the union were in any way related to or affected the process of collective bargaining or other concerted protected activities.

Similarly, petitioner has failed to make any

showing that respondent's actions were directed to the "mutual aid and protection" of other employees of the petitioner. The "mutual aid or protection" language addresses activities by employees "to better their working conditions." *Eastex Inc. v. NLRB*, 437 U.S. 556, 567 (1978). Petitioner offers no suggestion as to how running for union office is related to improvement of working conditions.

Conclusion

The Petition fails to demonstrate the existence of a conflict with *Garmon*. Likewise, it fails to show that the unique facts of this case present any question of important federal law justifying the Court's consideration. The Court should deny the petition.

Respectfully submitted,

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Supreme Court, U.S.
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91-727

UNITED STATES SUPREME COURT

October Term 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,

Petitioner,

v.

EDWARD C. NICHOLS,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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91-727

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Petitioner,	)
v.	)
EDWARD C. NICHOLS,	)
Respondent.	)

PETITIONER'S REPLY MEMORANDUM

Petitioner, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC ("ACTWU") addresses this reply to two points first raised by Respondent Edward C. Nichols ("Nichols") in Part II of his Brief in Opposition: that his job is excluded from coverage under the National Labor Relations Act ("Act") as a "managerial" position and that his

running for office was not protected concerted activity under the Act.

We demonstrate below that Nichols is wrong on both points. His retaliatory refusal to hire claim against ACTWU is at least arguably within the Act's jurisdiction — as Nichols himself previously claimed in his unfair labor practice charge to the National Labor Relations Board ("Board"). [Rec. 149, 154] Nichols' Brief in Opposition thus fails to show any reason why this case is not ideally suited for review of the significant issue presented squarely and cleanly by our petition.

1. The position which Nichols sought with ACTWU is arguably covered by the Act.

Nichols now claims that the Board would not have jurisdiction over his claim because his job was a "managerial"

one within the meaning of NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). That Nichols' position at the joint board level may be "managerial" does not answer the question of his status at the level of the parent organization, ACTWU, from whom he seeks relief in this case.

Although the South Carolina Supreme Court did not deal with the point Nichols is raising here, the Court of Appeals did address this argument — and did so properly:

> Nichols also argues the general principle that management employees are not subject to the jurisdiction of the NLRB. We agree with this general principle but find it unavailing in this case. If Nichols is an employee of the [joint board] rather than [ACTWU], then clearly he is a managerial employee not subject to the NLRB's jurisdiction. But if he is an employee of the [joint board] then [ACTWU] does not owe him any wages. If, as Nichols contends, he is an

> employee of [ACTWU], then it is at least arguable that he is not a managerial employee and, therefore, is subject to the NLRB's jurisdiction.
>
> Petition, p. A-20

Furthermore, as this Court explained in the analogous context of statutory supervisors, state courts are not free to assume jurisdiction unless the employee status of an individual "has been settled with unclouded legal significance." Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n, 382 U.S. 181, 190 (1965). In this case, had Nichols sought wages from the joint board where he was elected, his claim of "managerial" status would have some force. By choosing to seek wages from the parent union, however, Nichols made his claim dependent on his relationship with ACTWU itself, not its joint board. In these

circumstances South Carolina is certainly not free to assume jurisdiction over a relationship which Nichols himself previously claimed by his Board charge was covered by the Act.[1]

Indeed, it bears emphasis that Nichols' claim of exclusion from the Act's coverage is a complete about-face from his earlier position. Before filing this lawsuit Nichols filed his unfair labor practice charge with the Board in NLRB Case No. 11-CA-12320 claiming that

---

[1]Nichols' reliance on an arbitration award, which involved neither himself nor the joint board in question, does not support his argument about jurisdiction under the Act. That award simply holds that individuals who exercise independent judgment "at the Joint Board level" [Rec. 190] are "managers" and thus excluded from a bargaining unit of the union's employees. [Rec. 184] The award does not address, much less decide, the issue of whether the ACTWU staff representative job to which Nichols was seeking reinstatement is subject to the Board's jurisdiction. Ibid.

ACTWU had discriminated against him as an "employee" under the Act. [Rec. 149] We are confident that in view of this chronology the Court will appropriately discount Nichols' newly found enthusiasm for the "managerial" exclusion from the Act.

In any event, Nichols' attempt to avoid review by claiming that he is outside the Act's coverage is unavailing. The petition presents no jurisdictional difficulty which would make the case an inappropriate vehicle for examining the serious preemption issue raised by the South Carolina Supreme Court's decision.

2. Nichols' conduct is arguably covered by the Act.

Nichols' running for office is protected concerted activity under § 7 of the Act. 29 U.S.C. § 157. The depositions of Nichols and his allies

reveal a concerted effort by a dissident group of individuals within the joint board who wanted to oust Robert Ross, the incumbent manager. [Rec. 30-31 (Nichols); 81-82 (Fletcher Beck); 84-85 (J.B. Comer); 103 (William Cranford); 107 (Walter D. Stroud)] After considering other candidates, the group decided that Nichols would run against Ross, who was backed by ACTWU management, in the next election. Ibid. By undertaking this task with the support and for the benefit of his compatriots, Nichols' conduct fell squarely within the "other concerted activities" portion of § 7 of the Act.

The Board's regional office which handled Nichols' charge explained precisely how his running for office brought him within the Act's jurisdiction:

> Specifically, [Nichols] is alleging that as a result of his having won the election for the position of [joint board manager], [ACTWU] has retaliated against him by refusing to make the payment of his wages and benefits. The animus. . . is. . . his having defeated [ACTWU's] choice for the position of manager. . .
>
> [Rec. 154]

The failure of a labor union, acting as an employer, to hire or recall a staff representative in retaliation for that individual's protected concerted activities having to do with internal union affairs, is a recognized violation of § 8(a)(3) of the Act. E.g., Machinists Dist. Lodge 91, 298 NLRB No. 47, enforced 934 F.2d 1288 (2d Cir. 1991) cert. filed, No. 91-723 (November 4, 1991). Cf. Okla-Inn Inc., 198 NLRB No. 68 (1972), enforced 488 F.2d 498 (10th Cir. 1973) (Protest regarding employer's

selection of supervisory personnel is protected concerted activity).

In Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), this Court pointed out that it is for the Board to "delineate precisely the boundaries of the 'mutual aid or protection' clause" and that in doing so the Act must be construed generously so that employees would not be left "open to retaliation for much legitimate activity that could improve their lot as employees." 437 U.S. at 567-68.

In this case it is not difficult to understand how Nichols' running for office related to the well-being of employees represented by the joint board and to the joint board's collective bargaining activities themselves. The manager of a joint board negotiates and

services contracts between ACTWU and the employers by whom the joint board members are employed. It is the manager who handles grievances, arbitrations and other employee problems arising out of the performance of these contracts. Opposition to an incumbent manager by a dissident group would thus have an immediate bearing on the economic well-being of the employees in the local unions making up the joint board. That is how Nichols' running for office was inextricably bound up with the collective bargaining process as well as with other activities affecting the well-being of his fellow union members.

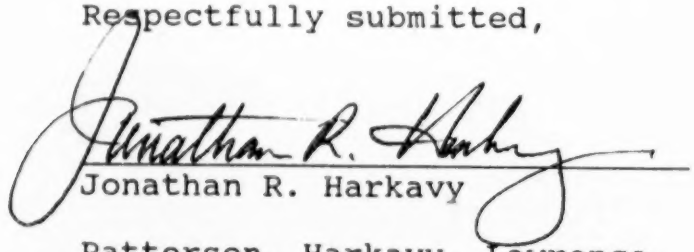
Opposition to certiorari on the ground that Nichols' activities are not within the Act's coverage is thus groundless both factually and legally.

Nichols' attempt to conjure jurisdictional difficulties, however artful, is ultimately illusory and cannot obscure the importance, substantiality and clean presentation of the question presented for review.

CONCLUSION

For the reasons stated in ACTWU's petition and in this reply, a writ of certiorari should issue to review the decision of the South Carolina Supreme Court.

Respectfully submitted,



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